(3)

No. 06-83

Supreme Court U.S.
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In the Supreme Court of the United States

MOHAMMED HUSSAIN,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY,
DEPARTMENT OF VETERAN'S AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Dr. Hussain Consistently Argued, in the District Court and Court of Appeals, that each Enumerated Act Constituted a Retaliatory Adverse Action

On pages 8-9 of its *Opposition*, the VA disingenuously claims that Dr. Hussain raised, "*for the first time,*" at the Supreme Court level, the argument that the individual enumerated acts that the Agency took against him were "adverse actions" within the meaning of Title VII; however, Dr. Hussain has consistently made this argument at both the district court and the Court of Appeals.

Dr. Hussain has consistently asked both the district court and the Court of Appeals to adopt and apply the definition of adverse action eventually adopted by this high Court in *Burlington v. White*, 126 S.Ct. 2405 (2006) (decided June 22, 2006). As discussed in Dr. Hussain's *Petition for Cert.*, at 9, the enumerated acts that the Court of Appeals deemed not to be adverse actions within the meaning of Title VII are now actionable.[1]

This case provides this Court with a vehicle for interpreting *Burlington* with respect to fifteen different individual employer actions. Addressing so many specific and fairly common employer practices in one case will provide guidance for courts faced with the question of whether one or more of the same employer acts constitute adverse actions in retaliation for protected activity under Title VII.

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[1] These actions include Dr. Hussain's: 1) demotion; 2) sudden poor performance evaluations; 3) report to the National Malpractice Data Bank; 4) denial of union representation; 5) threats of termination; 6) fostering insubordination toward Dr. Hussain, at the risk of endangering patient safety; 7) excessive monitoring; 8) suspension/restriction of clinical privileges; 9) withholding of retirement/disability retirement papers necessary to timely obtain retirement income; 10) denial of counsel and failure to provide retirement options in writing; and 11) denial of access to personnel file.

*A. **District Court***

On pages 5-6 of its *Opposition*, the Agency admits that that Dr. Hussain raised the issue of individual adverse actions at the district court level: "[t]he district court found that 11 of the alleged retaliatory acts did not rise to the level of adverse employment actions...." In his *Opposition to Defendant's Motion for Summary Judgment*, pages 23-33, Dr. Hussain listed, and discussed in detail, 15 individual retaliatory acts committed against him by the Agency constituted individual adverse actions.

B. ***Court of Appeals***

1. ***Dr. Hussain's March 14, 2006 Petition for Rehearing and March 30, 2006 Supplement***

On March 14, 2006, Dr. Hussain filed a *Petition for Rehearing, or for Rehearing, En Banc*. Dr. Hussain asked the Court to reconsider its decision affirming the district court's decision for several reasons, including the fact that the law in the D.C. Circuit had changed. The D.C. Circuit had issued several decisions changing, clarifying, expanding and redefining an actionable "adverse action" within the meaning of retaliation claims brought under Title VII. Beginning with its January 10, 2006 decision in *Holcomb v. Powell*, 433 F. 3d 889 (D.C. Cir. 2006) (Jan.10, 2006),[2] the D. C. Circuit's definition of "adverse action" directly conflicted its own decision in *Hussain*. *Cert. Petition*, at 7-11; *Rehearing Petition at* 3-6. The court further expanded the definition of adverse actions after *Holcomb* with *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006) (February 28, 2006) and *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006) (March 17, 2006). See *Cert. Petition*, at 7-9. In

[2]Interestingly, Judge Rogers was on both the *Holcomb* and *Hussain* panels; yet these cases were inconsistently decided. *Hussain* failed to cite *Holcomb* or to otherwise acknowledge the new, expanded definition of adverse actions adopted, by the same Court, two weeks earlier, in *Holcomb*.

his *Petition for Rehearing*, at 3-6, and *Supplement*, Dr. Hussain argued that this new D.C. Circuit case law required the reversal of the Panel's decision in *Hussain*. The Court declined to rehear the case; however, Dr. Hussain certainly argued the issue, with updated case law, before the Court of Appeals.

2. December 5, 2005 Oral Argument

Dr. Hussain could not cite *Burlington, Holcomb, Rochon or Chappelle-Johnson* in his Appellate *Briefs* or oral argument because they had not yet been decided; however, Judge Tatel specifically engaged counsel in a discussion about whether Dr. Hussain had abandoned his argument that the enumerated retaliatory acts listed in his motion for summary judgment were adverse actions. Tr. 12-15. Judge Tatel asked, "You are challenging, you are claiming each of those is, by itself, sufficient to be retaliatory?" Counsel answered, "Yes...." Judge Tatel asked for references to his *Brief* and counsel provided them, selecting examples of the individual acts that constituted adverse actions alone. *Id.*

3. ***Appellate Briefs***

Even in its own Appellate Brief, the Agency framed one of the "*Issues Presented*," as "Whether the District Court correctly found that the appellant failed to establish *adverse personnel actions*." (Emphasis added) The Agency has therefore admitted that this was an issue before the Court of Appeals.

Dr. Hussain cited and discussed cases that supported his argument that the individual acts that the Agency took against him constituted adverse actions. Hussain Brief, at 43-47. Dr. Hussain also argued that he was required to present evidence sufficient to create a genuine issue of disputed fact as to "whether the Agency's actions against Dr. Hussain constituted adverse actions, within the definition of Title VII. Hussain Reply Brief, at 3-4. The Agency's argument that Dr. Hussain has waived his right to now argue

this issue before this Court is based on a gross misrepresentation of the record.

II. The Agency has Misrepresented Material Facts

A. The Agency Misrepresents Dr. Hussain's Rejection and Demotion as a "Reorganization"

On page 3 of its *Brief in Opposition* (*Opposition*), the Agency contends that, after Dr. Hussain filed his February 14, 2001 EEO charge, -"reorganization at the hospital continued;" however, there was no reorganization. Within a year after Dr. Manning's hire, the hospital promoted her to the Chief position that Dr. Hussain had been filling, on an Acting basis, for four and a half years.[3] The hospital demoted Dr. Hussain from his Acting Chief position to being Dr. Manning's Deputy. This was not"reorganization;" rather, it was a demotion for Dr. Hussain and a rejection of him for a promotion. Even if it was a reorganization, it was a retaliatory adverse action, designed to demote Dr. Hussain.

B. The Agency Misrepresents Dr. Hussain's "Cutting and Pasting" of Patient Histories and Test Results as a Failure to Diagnose Patients

On page 4 of its *Opposition*, the Agency states that, based on required "special documentation and review of petitioner's patient visits" imposed on Dr. Hussain by the hospital, the hospital "became concerned that petitioner was simply copying other physicians' diagnoses without independently confirming them." This is the first time that the Agency has indicated that Dr. Hussain had a duty to diagnose, or to confirm the radiologists' "diagnoses." The Agency cites the Appendix, page 25, which is the d*istrict court* decision, which states:

> Upon review of the required documentation in August 2003, Dr. Barth and Dr. Manning found "an

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[3] The Agency violated Section 5 U.S.C. § 3341 by keeping Dr. Hussain in an Acting position beyond 120 days.

> alarming pattern that Dr. Hussain finds it appropriate to copy and paste other physicians [sic] assessment into electronic patient record without giving evidence that he has actually seen and examined the patient prior to, during, or after treatment." (Def's Ex. 4 at 5.)

Dr. Hussain was a *therapeutic* radiologist. His job was to *treat* cancer, *not to diagnose* it. Dr. Hussain treated patients after they had been diagnosed. Dr. Hussain's job description did not include diagnosis of patients and *his clinical privileges did not permit him to diagnose.* If he had diagnosed patients, *he would have been mal-practicing.*[4]

Dr. Hussain has repeatedly explained that he electronically "cut and pasted" patient histories, including test results. The Agency has never disputed Dr. Hussain's repeated assertion that the electronic "cutting and pasting" of patient histories is the standard practice among physicians at the hospital and in other medical facilities. The patient diagnosis depends upon pathology reports and other related diagnostic procedures. These *past* test results do not change.

Once the patient was diagnosed, it was Dr. Hussain's decision whether to treat the patient with radiation therapy, surgery and/or chemotherapy. Dr. Hussain had to inform the patient of the options available and the consequences of each cancer treatment, in order to obtain the patient's informed consent to any treatment. Dr. Hussain also had to make decisions as to whether additional or new treatments should be administered. He had to discuss the progress and options of treatment with the patient at each stage.

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[4] Although it was not Dr. Hussain's job to diagnose, unlike Drs. Barth, Manning, or any other radiologist at the hospital, Dr. Hussain was trained and certified in both diagnostic and therapeutic radiology. He could understand the pathology reports, integrate the information into the treatment, detect errors in diagnoses and/or reading pathology reports and bring those errors to the attention of the diagnostician.

In order to properly inform his patients, Dr. Hussain had to continue his own education on new procedures.[5] All of this information was in the patient charts, which are in the exclusive control of the hospital. Dr. Hussain had no opportunity to obtain these records because he was erroneously denied discovery. (See *Petition*, at 21-30). The hospital has never alleged that Dr. Hussain failed to obtain informed consent or that he left a patient untreated. The Agency has never alleged that a patient claimed that a patient denied seeing Dr. Hussain when his record indicated that he had treated the patient. The hospital did not produce even one patient chart[6] to substantiate its claims of inaccurate record keeping; yet, Judge Huvelle adopted the Agency's completely *unsubstantiated allegation* as fact.

The Court of Appeals recognized that Judge Huvelle ignored Dr. Hussain's exhibits, including Agency memoranda and minutes of meetings, rebutting the Agency's specific allegations of poor performance by Dr. Hussain, including its claims that Dr. Hussain "failed to hire necessary staff, correct personnel problems, and request important equipment." 435 F. 3d at 365 (D.C. Cir. 2005) (*See also Petition*, at 18). The Agency has made misrepresentations regarding Dr. Hussain's patient records in the hope that the courts, non-medical personnel, can be confused into believing that Dr. Hussain falsified records and/or neglected patients. Indeed, despite the Court of Appeals conclusion that Dr. Hussain "was a better candidate than the hospital

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[5] For example, Dr. Hussain obtained training in brachytherapy and to institute this prostate cancer treatment at the hospital.

[6] Although patient charts are confidential medical records, the patient's name and other identifying information could have been redacted and/or the medical records could have been produced under seal to protect patient privacy; however, the Agency never offered to produce any such document.

admits..." (*Id.*), the Court adopted the district court's erroneous conclusion that:

> Dr. Barth and Dr. Manning found "an alarming pattern that Dr. Hussain finds it appropriate to copy and paste other physicians [sic] assessment into electronic patient record without giving evidence that he has actually seen and examined the patient prior to, during, or after treatment. (Def's Ex. 4 at 5.)

App. 25. The Court further concluded that the Agency had established a non-discriminatory/non-retaliatory legitimate reason for Dr. Hussain's non-selection, stating: "Dr. Barth's July 2002 evaluation (approved by Dr. Fletcher) noted problems with Dr. Hussain's performance," and specifically cited "record-keeping," as one of these "reasons." There is absolutely no evidence in the record to support this serious allegation.

C. Dr. Hussain Produced the Required Medical Documentation to Obtain Sick Leave

Also on page 4 of its *Opposition*, the Agency alleges that Dr. Hussain produced "a doctor's note," stating that his emotional state required that he take leave from the stressful work environment." The Agency further claims that it requested additional medical documentation and that Dr. Hussain did not provide it; however, Dr. Hussain produced diagnoses and recommendations (not a "note") from *two* different treating physicians, both psychiatrists, that he take leave for work related stress. Hussain's *Opposition to Defendant's Motion for Summary Judgment*, Exhibits TT.

The Agency told Dr. Hussain that it would not grant him his earned, accumulated sick leave without additional documentation; however, the Agency gave Dr. Hussain absolutely no idea what type of additional documentation it required of him or his doctors. Even after years of litigation, the Agency has *never* provided the slightest guidance as to

what "additional documentation" Dr. Hussain could possibly have provided. The Agency has never cited any regulation, rule, provision of the union contract or any document indicating that anything more than a letter from the applicant's treating physician is necessary to take earned sick leave. The Agency never asked Dr. Hussain to submit to an Independent Medical Examination or diagnosis. Dr. Hussain could not produce anything more than he had produced.[7]

D. The Agency Misrepresents the Circumstances of Dr. Hussain's Motion to Enlarge Discovery

On page 5 of its *Opposition*, the Agency states that Dr. Hussain did not request an enlargement of discovery until "more than one month" after the Agency filed its *Motion for Summary Judgment.* The Agency has misrepresented the time line of events as well as the surrounding circumstances. The Agency filed its *Motion for Summary Judgment* on June 18, 2004 (Docket # 26), ten days late, after being granted two previous enlargements of time.[8] On July 8, 2004 – *16 days* after the Agency filed its *Motion for Summary Judgment* (not "more than a month," as the Agency alleges) -

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[7] The Agency has never suggested that Dr. Hussain should have provided his entire confidential medical file. Particularly since these medical records were records of psychotherapy, where the patient shared his most confidential secrets, such an invasion of privacy and the doctor-patient privilege would be intolerable.

[8] The original Scheduling Order, issued on October 27, 2003, set the close of discovery for March 27, 2004 and the date for dispositive motions as April 26, 2004. (Docket # 20) On April 14, 2004, the Defendant Agency moved to extend the deadline for its own dispositive motion to May 11, 2004 (Docket # 23). On May 7, 2004, the Agency filed a second motion for an enlargement, requesting that it be permitted to file its dispositive motion by June 8, 2004 (Docket # 24) On June 4, 2004, the Agency filed a third motion for an enlargement of time until June 18, 2004 (Docket # 25). The Court never ruled on the motion, but the Agency filed on June 18, 2004, without apology, explanation or penalty.

- the undersigned, Ms. Martin, entered her *Notice of Appearance*, as co-counsel with then lead counsel, Tony Shaw (now deceased).

> Plaintiff's counsel of record, Mr. Shaw, has informed the undersigned and Dr. Hussain that he has also obtained consent of opposing counsel to extend discovery, and intends to file a motion for an enlargement of discovery, based on this consent. Indeed, since the Agency did not even file an Answer to the November 6, 2003 Second Amended Complaint until June 24, 2004; certainly, Dr. Hussain could not be expected to depose witnesses or otherwise adequately conduct discovery without even the benefit of an Answer to the *Second Amended Complaint*.

On the same day, Agency counsel filed a *Response* to the undersigned's *Notice of Appearance*, denying that she and Mr. Shaw ever had any agreement to extend discovery and even denied that she and Mr. Shaw ever discussed the matter. In light of Ms. Abel's denial of Mr. Shaw's claims and a conference call with Judge Huvelle setting a hearing on the issue, the undersigned filed a formal *Motion to Enlarge Discovery*, on July 10, 2006, relying on both on Rules 14.4(b) (discussed on pages 2-4 of the motion) and 56(f) (page 4-9, particularly page 7).

As Judge Rogers stated in her concurring opinion, the client should not suffer for the negligence of his or her lawyer if the lawyer "misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention." *Jackson v. Washington Monthly Co., 186 U.S. App. D.C. 288, 569 F.2d 119, 122 (D.C. Cir. 1977).* (App. 15) Judge Rogers erroneously assumed that Mr. Shaw did *not* mislead Dr. Hussain into believing that the case was progressing properly. Judge Rogers relied on this misplaced assumption

to conclude that Dr. Hussain should therefore bear the burden of forfeiting discovery due to Mr. Shaw's negligence (*Id.*); however, the record is clear that Mr. Shaw represented to both the client – and even to the new attorney entering the case – that the case was proceeding properly and that the attorneys had agreed to enlarge discovery in light of the Agency's enlargements of time to file an Answer to the Second Amended Complaint.[9]

Applying *Jackson v. Washington Monthly Co.* and the reasoning in Judge Rogers' concurrence to the facts of this case, Dr. Hussain should not be denied discovery due to Mr. Shaw's failure to file a formal motion to enlarge discovery.

CONCLUSION

Dr. Hussain respectfully requests that this Court grant *certiorari*.

Respectfully submitted,

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[9] Mr. Shaw did present evidence that he had such an agreement with Ms. Abel.